WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2354

IN THE MATTER OF: Served August 5, 1982

Motion by DIAMOND TOURS, INC., for)
Extraordinary Relief from)
Certificate Revocation) Case No. MP-82-06

By Order No. 2347, served June 24, 1982, and incorporated by reference herein, the motion for extraordinary relief filed by Diamond Tours, Inc., was denied. Specifically, Diamond sought recision of Commission Order Nos. 2224 and 2244, which respectively suspended and revoked Diamond's Certificate of Public Convenience and Necessity No. 2, and issuance of an order indicating that Certificate No. 2 is in full force and effect.

On July 16, 1982, Diamond filed its application for reconsideration of Order No. 2347. On reconsideration, Diamond contends that equitable factors militate strongly in favor of granting relief from the revocation and that the Commission's failure to hold a hearing regarding the suspension and revocation renders the actions invalid and unenforceable.

With respect to equitable considerations, Diamond reiterates its financial problems and alleged difficulties with its insurance carrier, as discussed in Order No. 2347, which led to a cessation of operations during the Spring of 1981. 1/

Diamond alleges once again that its management did not receive notice of either the suspension or revocation ". . . until some time after revocation," and asserts that ". . . there has been no evidence introduced of provision of actual notice."

Diamond further alleges that inasmuch as the suspension and revocation of its certificate were not based upon action taken

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1/ See Order No. 2347 at page 2, particularly footnote 3.

subsequent to hearing, the decisions are ". . . therefore invalid as beyond the statutory authority of the Commission." Diamond cites Title II, Article XII, Section 4(g) of the Compact which authorizes suspension or revocation of a certificate after notice and hearing. It asserts that ". . . the Commission (in Order No. 2347) argues that it (the Commission) is empowered to suspend or revoke certificates, without hearing, under the provisions of Title II, Article XII, Section 9(a) of the Compact. 2/ Diamond states that the Commission was not granted authority to suspend or revoke certificates without hearing and that the statutory language of Section 4(g) cannot be ignored.

In addition to exceeding statutory authority, the Commission denied due process to Diamond in the suspension and revocation proceeding, according to applicant. It is alleged that failure to hold a hearing renders administrative action invalid as a violation of statute and due process where a hearing is mandated as a prerequisite to action affecting individual property rights. Diamond asserts that this is particularly true when, as is said to be the case here, the "evidence" indicates that the holder of the license did not receive notice of the proposed revocation prior to the actual revocation. 3/

To the extent that the instant application for reconsideration seeks reconsideration of Order Nos. 2224 and 2244 it will be dismissed. Section 16 of Title II, Article XII of the Compact allows 30 days after the publication of a final order or decision of the Commission to file an application for reconsideration. 4/ Argument concerning the procedures used in deciding the suspension and revocation issues of those orders should have been raised timely on reconsideration. Diamond is foreclosed from attacking those decisions at this late date.

Assuming, arguendo, that the merits of the matters raised in the motion for extraordinary relief are properly before us, the Commission finds that the application for reconsideration should be

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2/ This section, as pertinent, provides that no certificate shall remain in force unless the certificate holder complies with reasonable regulations regarding insurance coverage.

3/ In actuality, Diamond submitted no evidence in this case or in the suspension and revocation proceeding. The only evidence regarding notice to Diamond is the Commission's records wherein the Executive Director certified that copies of Order Nos. 2224 and 2244 were duly mailed to Diamond and its counsel on their respective dates of service.

4/ See Order No. 2437, page 4, footnote 4.

denied. The equitable issues raised by Diamond were adequately discussed in Order No. 2347. No new "evidence" is asserted and no new argument is made. It suffices here merely to add that the signatories to the Compact resolved any equities against allowing an uninsured carrier to remain eligible to operate. The above-referenced prohibition of Title II, Article XII, Section 9(a) of the Compact is not discretionary.

Diamond's rehashing of the purported lack of notice to management is fatuous. It has failed to present a scintilla of evidence in support of its assertions that management did not receive notice of Commission action regarding suspension or revocation ". . . until some time after revocation." Not only were copies of the suspension and revocation orders mailed to Diamond's business address on the date of service pursuant to Commission Rule 5-01 but the attorney of record for Diamond was also served at the same time. Additionally, the Commission notified Diamond by letter of March 27, 1981, prior to the suspension and revocation, that Diamond's insurance carrier had notified the Commission of the impending date of insurance cancellation, and that Diamond must file a new certificate of insurance before the cancellation date. The Commission received no response to the letter and no reconsideration request or other communication after issuance of Order Nos. 2224 and 2244.

Diamond was not denied due process of law by the absence of a public hearing nor did the Commission exceed its statutory authority by suspending and revoking the certificate without an oral, trial-type hearing. Certainly Diamond's assertion that the Commission acted solely under the provisions of Section 9(a) of Title II, Article XII is misplaced. The Commission cited Title II, Article XII, Section 4(g) (the hearing statute) in conjunction with Section 9(a) and went on to discuss the suspension issue as it relates to the inability of a carrier to operate without the proper insurance filings. More importantly, regarding both suspension and revocation, it is clear that no facts were in issue. Diamond's insurance had been cancelled, the company had been given ample notice of the cancellation and suspension and at no time did Diamond cure the problem. Diamond did not then, nor in its motion for extraordinary relief or the instant application for reconsideration allege that there have been any facts in dispute. In fact, given its failure to respond to a Commission letter or orders, it appears that the scheduling of a hearing, as would have been appropriate had Diamond responded to Order No. 2224 and raised a material issue of fact, would have been similarly ignored. 5/

5/ Obviously, only an unusual set of circumstances would result in a material fact being genuinely disputed. The sole factual question is whether appropriate evidence of insurance has been filed with the Commission, and the Commission's official records normally constitute the best evidence of whether such a filing has been made.

In any event, the statutory requirement for a hearing does not require an oral, trial-type process. Professor Davis states that

> The main question of statutory interpretation concerning requirement of opportunity to be heard is whether and when a statute requiring "hearing" means a hearing with a determination on the record. . . . In the context of adjudication, when should a statutory requirement of opportunity for "hearing" be interpreted to require a trial-type hearing? That is our main question in this section. The first step in answering is to observe that trial procedure is always inappropriate on nonfactual questions: whenever the issue is nonfactual, the required hearing may consist wholly of argument and need not include presentation of evidence subject to cross-examination. . . . [Emphasis added] 6/

In interpreting the Administrative Procedure Act, the Supreme Court held that ". . . we are convinced that the term 'hearing' as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." United States v. Florida East Coast Railway Company, 410 U.S. 224, 240, 93 S.Ct. 810, 818, 35 L.Ed.2d 223 (1973). The Court, citing FCC v. WJR, 337 U.S. 265, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949), stated that it is

> . . . established that there was no across-the-board constitutional right to oral argument in every administrative proceeding regardless of its nature. While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. [Emphasis added]

In addressing the issue of due process in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), the Court stated

> We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of

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6/ 2 K. Davis, Administrative Law Treatise Section 12.10 (1979).

> procedure, trial and review which have evolved from the history and experience of courts." [Citation omitted] The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." [Citation omitted]

At no time has Diamond asserted the presence of disputed facts. 7/ The Commission gave Diamond ample opportunity to furnish a valid certificate of insurance or otherwise to show cause why its certificate should not be revoked.

THEREFORE, IT IS ORDERED that the application for reconsideration filed by Diamond Tours, Inc., to the extent it seeks reconsideration of Order Nos. 2224 and 2244, is hereby dismissed, and to the extent it seeks reconsideration of Order No. 2347, is hereby denied.

BY DIRECTION OF THE COMMISSION, COMMISSIONERS CLEMENT, SCHIFTER AND SHANNON:

WILLIAM H. McGILVERY
Executive Director

7/ Clearly, no valid certificate of insurance was on file at the time of suspension and revocation, and Diamond has admitted in this proceeding that no policy of insurance was in force.